No. 10-1012

Supreme Court, U.S.
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In The

Supreme Court of the United States

HEATHER DUCASSE,

Petitioner,

v.

STATE OF MAINE,

Respondent.

On Petition For A Writ Of Certiorari To The Maine Supreme Judicial Court Sitting As The Law Court

PETITIONER'S REPLY BRIEF TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. There is no merit to Respondent's argument that Petitioner waived the confrontation issue.

The Respondent State of Maine's ("Respondent") argument that Petitioner Heather Ducasse ("Petitioner") waived the confrontation issue is disingenuous. On brief, the Respondent agrees that Petitioner asserted a timely objection to the certificate of compliance, and specifically cited *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2542 (2009) (App. at 31-33; 22-25). The Respondent also concedes that the trial court considered Petitioner's objection during the evening recess, and held that *Melendez-Diaz* did not preclude admission of the certificate of compliance on confrontation grounds.

Following the trial court's ruling, the Respondent recognized that a custodian of records would need to provide a brief foundation to introduce the certificate of compliance as a business record under Rule 803(6) of the Maine Rules of Evidence. In light of this Court's observation in *Melendez-Diaz*, 129 S.Ct. at 2542 that defense attorneys will not "want to antagonize the judge or jury by wasting their time with the appearance of a witness whose testimony defense counsel does not intend to rebut in any fashion," Petitioner stipulated that the Respondent could produce a witness who would lay a foundation for the introduction of the certificate of compliance under Me. R. Evid. 803(6) since the trial court had held that its admission did not raise any confrontation issues. (App. at 28).

With respect to the admission of the certificate of compliance, defense counsel specifically noted: "I maintain my objection that I stated earlier." (App. at 28). Petitioner also interposed a timely objection when the certificate of compliance was formally admitted before the jury and the trial court recognized that the exhibit was admitted over objection. (App. at 28).

Moreover, the Respondent's bald claim that it was willing to call a witness subject to cross-examination is without merit. Patricia Yarrington, the person who ostensibly confirmed the facts contained in the certificate of compliance, was not even listed as a witness at trial and the Respondent had no information regarding her whereabouts. The only person the Respondent may have called was a custodian of records who would merely provide foundational testimony.

In the decision below, the Maine Law Court did not address this claim of waiver for the simple reason that it was not raised by the Respondent and there was no merit to the argument. The Maine Law Court only held that the statements in the certificate of compliance were non-testimonial and did not violate Petitioner's right of confrontation. (App. at 8).

II. The cases cited by the Respondent reveal the conflict among lower courts.

Respondent claims that if an expert statement is not expressly prepared for use at a specific trial, that

expert statement is non-testimonial and does not implicate the Confrontation Clause. (Respondent's Brief at 8-9). Petitioner submits that the Respondent is incorrect.

In the present case, the statement that chemical additives "will not disturb the integrity of the blood sample relative to the alcohol content" is an expression of expert opinion and is not raw data relied upon by an expert. This statement is testimonial under *Melendez-Diaz*.

Calibration records and other raw data relied upon by experts are distinct from ultimate expert opinions. As noted in the Petition, the Fourth Circuit, Seventh Circuit, New Hampshire Supreme Court, and Kansas Supreme Court have all noted the distinction between non-testimonial raw data and testimonial expert conclusions. (Petition at 6-8). In contrast, the cases cited by the Respondent are fact-specific and are in conflict with the cases cited by Petitioner.

In *State v. Fitzwater*, 227 P.3d 520 (Haw. 2010), the Hawai'i Supreme Court addressed in *dicta* the issue whether a speed check card that showed the police officer's speedometer had previously been calibrated was a testimonial statement within the meaning of the Confrontation Clause. *Id.* at 523. The court ultimately vacated part of the defendant's speeding conviction on the grounds that the State failed to lay a proper foundation for admission of the speed check card as a business record. *Id.* at 542-43.

The decision in *Fitzwater* engendered a significant dissent. The dissent not only criticized the majority's conclusion that the speed check card was not testimonial, but also noted that the court did not need to reach that issue. *Id.* at 553-54. Furthermore, the dissent also cited the conflict among lower courts on this issue. *Id.* at 554 (citing *New York v. Carreira*, 2010 WL 254901 at *5).

The Respondent's reliance on the intermediate appellate court decision in *Oregon v. Bergin*, 217 P.3d 1087 (Or. 2009) is also misplaced. In *Bergin*, the Oregon Court of Appeals merely noted that:

> *Melendez-Diaz* either rejects, or at least leaves open, the question of whether Intoxilizer certificates used in Oregon DUII prosecutions are "testimonial." Because neither the Oregon Supreme Court nor the United States Supreme Court has rejected our analysis in *Norman*, we do not consider it to be overruled.

Id. at 1090.

The intermediate appellate court's decision reveals the confusion and conflict among lower courts addressing this issue.

Finally, the Respondent's reliance on *New York v. Lent*, 908 N.Y.S.2d 804 (2010), *leave to appeal denied*, 908 N.Y.S.2d 166 (2010), is not only inapposite, but reveals the conflict among the lower courts in New York State. Cf. *New York v. Carreira*, 2010 WL 254901 at *5. Petitioner agrees that expert witnesses

may rely on non-testimonial raw data to reach testimonial expert opinions. In the present case, the statement that the chemical additives in the test tube "will not disturb the integrity of the blood sample relative to alcohol content" was a testimonial opinion based on the amount and type of chemical additives and the application of scientific principles. This expert opinion was testimonial evidence intended to establish an important fact at trial, and the admission of the certificate of compliance violated Petitioner's right of confrontation.

III. This case is an excellent vehicle to address whether the right of confrontation is violated by the introduction of a certificate that offers an expert conclusion not subject to cross-examination.

The Respondent focuses too narrowly on the specific facts of the present case and *Bullcoming v. New Mexico*, No. 09-10876, and ignores the constitutional principles. In *Bullcoming*, the issue presented was whether the Confrontation Clause permits the prosecution to introduce the testimonial statements of a non-testifying forensic analyst through in-court testimony of a supervisor or other person who did not perform or observe the laboratory analysis described in the statements. The issue in *Ducasse v. Maine* is more direct.

The issue presented in the present case is whether an expert opinion that chemical additives in blood

test tubes "will not disturb the integrity of the blood sample relative to alcohol content" was a testimonial statement that violated Petitioner's right of confrontation. In contrast to *Bullcoming*, the statement in the certificate of compliance was not relied upon by any witness, but rather was admitted to prove the important fact that the discrepancy between post-accident observations of Petitioner and her blood alcohol test could not be attributed to the chemical additives in the test tubes. In both the present case and *Bullcoming*, this Court should hold that raw data that forms the basis of an expert opinion offered by a witness at trial is non-testimonial, but expert conclusions and opinions are testimonial evidence that implicate the right of confrontation under the Sixth Amendment to the United States Constitution.

Dated at Portland, Maine, this 15th of April, 2011.

Respectfully submitted,

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